Airgas USA, LLC *and* Steven Wayne Rottinghouse, Jr. Case 09–CA–189551

May 21, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 13, 2017, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed a limited cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the judge's recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding any employee's holiday pay because he or she filed charges with, assisted, or gave testimony to the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Steven Wayne Rottinghouse, Jr. whole for the holiday pay discriminatorily withheld in the amount of $337.12, plus interest accrued to the date of payment, and minus tax withholding required by Federal and State laws, as set forth in the remedy section of the judge's decision.

(b) Compensate Steven Wayne Rottinghouse, Jr. for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(c) Within 14 days after service by the Region, post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representa-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge made some factual errors in her decision, but we find these inadvertent errors do not materially affect the judge's analysis and correct them here. First, the judge once stated that Charging Party Steven Wayne Rottinghouse, Jr. called out for his personal day on the day before Thanksgiving 2016 less than an hour before his shift. As she correctly wrote earlier in her decision, Rottinghouse actually called out the evening before his shift. Second, the judge stated that Rottinghouse filed six charges with the Board between August 2013 and August 2015, but he only filed four. The judge reached the incorrect number by counting the charge that Rottinghouse filed in this matter on December 8, 2016, and a charge International Brotherhood of Teamsters Local Union No. 100, not Rottinghouse, filed on February 4, 2015. The judge repeated her misunderstanding that Rottinghouse filed the February 2015 charge later in the decision, but Rottinghouse did not file it and was only involved as one of the affected employees.

[2] We affirm the judge's conclusion, for the reasons she states, that the Respondent violated Sec. 8(a)(4) and (1) by withholding Rottinghouse's holiday pay for Thanksgiving 2016 because of his activity in the filing and litigation of unfair labor practice charges. We additionally emphasize that there is no evidence that prior to this incident the Respondent had ever denied an employee holiday pay when he or she took a personal day immediately before or after the holiday. The Respondent contends that it had a practice of not paying holiday pay if an employee, without a medical excuse, "called-off" for a personal day before or after a holiday—meaning that the employee notified the Respondent at some point between the end of his or her last shift and one hour before his or her next shift—as opposed to scheduling a personal day, before or after, farther in advance. There is no support for that distinction. The record contains examples of employees receiving holiday pay when taking either scheduled or called-off personal days, with or without a medical excuse, before or after holidays. The examples of Matt Kinkade and Dennis Hibbard that the Respondent contends support its position are inapposite. These employees were not paid for holidays where they called off the day before or after, but records indicate that they did not take *paid personal days*, as Rottinghouse and other employees who were paid for holidays had. Kinkade and Hibbard went without pay for their call-off days.

[3] We note that the judge's remedy incorrectly stated that backpay should be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), instead of *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), which applies when the violation found does not involve cessation of employment or interim earnings that would reduce backpay. The judge's misstatement is immaterial, however, because the Respondent admitted that, if found liable, the consolidated compliance specification alleged the correct amount of backpay: $337.12, plus interest, minus tax withholdings, plus the amount of any adverse tax consequences. We shall modify the judge's recommended Order and substitute a new notice to conform to the violation found and the Board's standard remedial language.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 21, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withhold your holiday pay because you filed charges with, assisted, or gave testimony to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Steven Wayne Rottinghouse, Jr. whole for the holiday pay we discriminatorily withheld in the amount of $337.12, plus interest accrued to the date of payment, and minus tax withholding required by Federal and State laws.

WE WILL compensate Steven Wayne Rottinghouse, Jr. for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for Rottinghouse.

AIRGAS USA, LLC

The Board's decision can be found at http://www.nlrb.gov/case/09-CA-189551 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Eric Taylor, Esq., for the General Counsel.
Michael Murphy, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Cincinnati, Ohio on June 1, 2017. Steven Wayne Rottinghouse, Jr. (Rottinghouse or Charging Party), an individual, filed a charge on December 8, 2016,[1] and an amended charge on March 20, 2017. The General Counsel issued the complaint and compliance specification on March 31, 2017,

[1] All dates are in 2016 unless otherwise indicated.

alleging that Airgas USA, LLC (Respondent) violated Section 8(a)(4) and (1) of the Act by refusing to pay Rottinghouse holiday pay for the 2-day Thanksgiving holiday in 2016. Respondent timely answered the complaint, denying the allegations and asserting several affirmative defenses.

The parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware Limited Liability Company, is engaged in retail sale and distribution of industrial gasses and related products at its facility in Cincinnati, Ohio, where it derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3] (GC Exh. 1(g).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business and Supervisory Structure

Respondent operates a facility at 10031 Cincinnati Dayton Road in Cincinnati, Ohio (Cincinnati facility). (Jt. Exh. 1.) Todd Allender is the plant manager and Dave Luehrmann is the branch facility manager at the Cincinnati facility. Luehrmann is responsible for the operation of the Cincinnati facility, including processing the payroll. (Tr. 142, 198.) Clyde Froslear is the operations manager over the Cincinnati facility; he also manages other facilities for Respondent. Jt. Exh. 2, p. 21–22.)

Allender and Luehrmann work at the Cincinnati facility on a daily basis and Luehrmann is the highest ranking person at the facility. (Tr. 21.) Froslear does not come to the Cincinnati facility on a daily basis. (Id.) Respondent admits, and I find, that Allender, Luehrmann, and Froslear are supervisors of Respondent within the meaning of Section 2(11) of the Act. (GC Exh. 1(g); Tr. 9–11.)

B. Respondent's Labor Relations

Respondent and Teamsters Local 100 (Union) have been signatory to a series of collective bargaining agreements, the most recent of which is effective from December 1, 2015 to November 30, 2018. (Jt. Exh. 1.) Barry Perkins has been the union steward at the Cincinnati facility for over 9 years. (Tr. 109–110.)

C. Rottinghouse's Employment with Respondent

Rottinghouse was employed as a driver by Respondent from September 2010 until February 2017, when he quit. (Tr. 20.) Rottinghouse was a member of Teamsters Local 100 while he was employed by Respondent. (Tr. 21–22.) Allender was Rottinghouse's immediate supervisor. (Tr. 20.) Allender, in turn, reported to Luehrmann, who reported to Froslear. (Tr. 20–21.)

D. Respondent's Dealings with the Board

The Charging Party has filed numerous charges with Region 9 of the National Labor Relations Board (Board). Rottinghouse filed a charge against Respondent with the Board in Case 09–CA–158662 in August 2015. (Jt. Exh. 2(b).) In February 2016, Rottinghouse testified in the hearing concerning that case before Administrative Law Judge Donna Dawson. (Jt. Exh 2.) I take notice of the fact that both Froslear and Luehrmann testified in the earlier hearing. (Id.; Tr. 96–97.) Judge Dawson's decision is pending before the Board on exceptions filed by Respondent.[4]

Between August 2013 and August 2015, Rottinghouse filed six charges with the Board. (GC Exh. 1(a), 2, 3, 4, 5, 6.) Rottinghouse filed the charge at issue in this case on December 8, about a month prior to his meeting with Froslear and Luehrmann over the discipline mentioned below. (GC Exh. 1(a).)

Respondent's managers have commented on Rottinghouse's activity with the Board. In April 2015, Froslear announced at a meeting that Respondent would no longer informally warn employees to get back to work from an overstayed break.[5] (Tr. 77–78.) Instead, Froslear said that Respondent would proceed directly to a write up. (Tr. 78.) Froslear went on to explain that Respondent was making this change because of NLRB charges.[6] (Tr. 78, 127–129.) Rottinghouse was not mentioned by name at this meeting. (Tr. 98, 129.) However, at the time of this meeting, Rottinghouse had recently filed a charge with the Board. (GC Exh. 3.)

In January 2017, Froslear met with Rottinghouse and his union steward about a write up for calling off an hour before his scheduled shift time.[7] (Tr. 81–82, 130–131.) Rottinghouse asked why, instead of writing him up, Respondent did not ask him what was going on that day. (Tr. 82, 132.) Froslear replied, "It's not like you've ever come and talked to us before you filed all these NLRB charges."[8] (Tr. 82, 133.) Froslear further mentioned having a list of the charges filed by Rottinghouse. (Tr. 82–83; 133.) Luehrmann testified that Froslear told

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[3] At the hearing, Respondent's counsel stated that Respondent "consented to the Board's jurisdiction." (Tr. 9, 10.)

[4] I admitted the transcript and exhibits from Case 09–CA–158662 for the limited purpose of showing Rottinghouse's activity with the Board. (GC Exhs. 2, 2(a), 2(b); Tr.76.) I have not considered these exhibits for any other purpose.

[5] Rottinghouse was present at this meeting.

[6] Rottinghouse testified that Froslear said "NLRB charges" and Perkins testified that Froslear said "NLRB standards." I do not find this difference material.

[7] This grievance is not at issue in this case.

[8] Perkins testified that Froslear stated, "Well, why is it you always have to file NLRB charges?" (Tr. 133.) I do not find this difference material, as Froslear was clearly expressing irritation with Rottinghouse's NLRB charge-filing activity.

Rottinghouse, "You don't come to us before a [NLRB] charge is made." (Tr. 204.)

E. Bereavement Leave

Respondent maintains a policy on bereavement leave, which is referenced in the collective-bargaining agreement between the parties. (Jt. Exhs. 1, 3.) According to the collective-bargaining agreement, unit members are subject to Respondent's bereavement leave policy under the same terms as non-unit employees. (Jt. Exh. 1.) Under Respondent's policy, employees receive up to 5 days of bereavement leave for the death of an immediate family member, such as a spouse, child, parent, step-parent, or step-child. (Jt. Exh. 3.) In the event of the death of an extended family member, such as a sibling, grandparent, or brother- or sister-in-law, employees receive up to 3 days of bereavement leave. (Id.) In the event of the death of a family member not listed in the policy, such as an aunt, uncle, niece, or nephew, an employee is allowed up to 1 day of bereavement leave. (Id.)

In November, Rottinghouse sought bereavement leave for the death of a family member. The person who died was the brother of Rottinghouse's step-father.[9] Rottinghouse considered this relative an uncle. (Tr. 36, 90.) The death occurred on November 22, the Tuesday before Thanksgiving. (Tr. 37.) When Rottinghouse was notified of the death, he called Allender. (Tr. 46.) Rottinghouse told Allender that he would not be able to take any late runs that day because his uncle had died. (Tr. 46.) That evening, while talking to his parents, Rottinghouse agreed to help clean out his uncle's apartment the next day. (Tr. 46–47.) Rottinghouse called Allender on Tuesday evening to notify Allender that he intended to take a personal day on Wednesday, November 23. (Tr. 49.) Thanksgiving Day fell on November 24. (GC Exh. 19.)

Rottinghouse learned about his uncle's funeral arrangements on November 26, the Saturday of Thanksgiving weekend. (Tr. 37.) At that time, Rottinghouse requested a bereavement day from Allender by leaving Allender a voicemail message. (Tr. 37.) The funeral for Rottinghouse's uncle was held on Monday, November 28, the day after the Thanksgiving weekend. (GC Exh. 19; Tr. 30.)

F. Holiday Pay and Personal Days

The collective-bargaining agreement between the Union and Respondent lists several holidays, including Thanksgiving Day and the day after Thanksgiving (collectively, the "Thanksgiving holiday"). (Jt. Exh. 1.) In order to be paid for a holiday, the contract states that the employee must work the regularly scheduled work day immediately preceding the holiday and immediately following the holiday. (Id.) The contract allows an exception for employees who have a proven illness or injury substantiated by a doctor's statement. (Id.) The parties also stipulated that an employee will be paid for a holiday if he or she takes a personal day on the day preceding or following a holiday, so long as the personal day is scheduled in advance. (Tr. 163.)

The collective-bargaining agreement also contains a provision regarding personal days. (Jt. Exh. 1.) Employees receive 5 personal days on January 1 of each calendar year. (Id.) In order to use a personal day, an employee is supposed to call in 1 hour prior to the start of his or her shift. (Id.)

Allender tracks employee time off by keeping notations in a calendar book he keeps on his desk. (Tr. 54, 143.) Rottinghouse photographed pages from Allender's calendar book. (GC Exhs. 17, 18, 19, 20.) Allender uses the abbreviation "PER" for personal day. (Tr. 55, 62, 144.) A star indicates that an employee was scheduled to work, but called off. (Tr. 144, 199.) Allender's calendar shows employees took personal days for the day before Labor Day and the days after Thanksgiving and Christmas (Tr. 57–58, 59, 60, 144–147.) For example, the evidence shows that an employee was paid for the Labor Day holiday in 2016, despite taking a personal day on the day after the holiday. (GC Exhs. 13, 18; Tr. 154–156.) However, this employee scheduled the personal day in advance. (Tr. 155.)

Luehrmann also keeps an attendance calendar in his office. (GC Exhs. 15, 16; Tr. 65.) Abbreviations used by Luehrmann include "V" for vacation, "P" for personal day, and "F" for floating holiday. (Tr. 67.) Like Allender's, Luehrmann's calendar indicates that other employees were paid for holidays when they took a personal day before or after the various holidays. (GC Exh. 15, 16; Tr. 67–68, 115–117.)

Allender tracks attendance and Luehrmann prepares the payroll. (Tr. 182.) Luehrmann uses Allender's calendar as a reference when preparing the payroll. (Tr. 147.) In processing the payroll, Luehrmann gets the calendar book from Allender's office and matches what is recorded there with the Kronos system and employee absences. (Tr. 198–199.) Allender and Luehrmann control which employees are paid for holidays. (Tr. 182.) Froslear has no role in determining whether an employee will be paid or not be paid for a holiday. (Tr. 82.)

Respondent has paid other employees for holidays when they did not work the day immediately before or the day immediately after the holiday. Employee Rick Miller was paid for the New Year's holiday in 2016. (Tr. 188.) Miller called off of work on January 4, the first day after the holiday, and did not produce a doctor's note. (R. Exh. 1; Tr. 188.) Allender said Miller should not have been paid and described this as an "error." (Tr. 188.) Another employee, John Jeffries, was paid for the Thanksgiving holiday in 2016 when he called off work on November 28 and took a personal day. (GC Exh. 14; Tr. 171–172.) Allender attempted to characterize this as a mistake.[10] (Tr. 171–172.) These were the only examples in evidence of other employees receiving holiday pay after calling off on the day before or after a holiday. (GC Exh. 14; R. Exh. 1; Tr. 188.) All of the other employees who received holiday pay when missing a day of work immediately before or after a holiday

[9] At some points in the transcript, the decedent is referred to as Rottinghouse's "step-uncle."

[10] I do not credit Allender's self-serving attempt to characterize the paying of these employees as a mistake or an error. This explanation seems especially implausible given that John Jeffries was paid for the same holiday for which Rottinghouse was not paid, and both called in to use a personal day.

had scheduled their day off in advance.[11]

G. Thanksgiving 2016

Thanksgiving Day 2016 fell on Thursday, November 24 and the day after Thanksgiving fell on Friday, November 25. Both days are considered holidays under the collective-bargaining agreement between the Union and Respondent. (Jt. Exh. 1.) Normal workdays for Respondent are Monday through Friday; Saturday and Sunday are not considered work days. (Tr. 60.) Therefore, the last work day before the Thanksgiving holiday would have been Wednesday, November 23 and the first work day after the Thanksgiving holiday would have been Monday, November 28.

There is no dispute that Rottinghouse did not work on the day immediately preceding or on the day immediately following the Thanksgiving holiday in 2016. Rottinghouse was scheduled to work on Wednesday, November 23, starting at 6:00 a.m. As outlined above, at about 5:16 a.m. on Wednesday, November 23, Rottinghouse called Allender's cell phone and left a message that he would not be at work that day and wished to use a personal day. Rottinghouse used a bereavement day for Monday, November 28.

On December 5 or 6, Rottinghouse accessed Respondent's computer system and learned that he was not being paid for Thanksgiving or the day after Thanksgiving. (Tr. 28.) Rottinghouse then approached Froslear and asked why he wasn't paid. (Tr. 29.) Froslear responded because Rottinghouse did not work on those days. (Id.) Rottinghouse then went to Luehrmann's office. (Tr. 30.) Rottinghouse asked Luehrmann why he was not paid for the day of his relative's funeral. (Tr. 30.) Luehrmann replied that, "there was no such thing as a step uncle." (Tr. 30.) Rottinghouse responded it wasn't his step uncle, it was his uncle. (Tr. 31.)

H. Rottinghouse's Grievances

Respondent did not pay Rottinghouse for Thanksgiving, the day after Thanksgiving, or the day of his uncle's funeral. (Tr. 28.) As a result, on December 7, Rottinghouse filed numerous grievances with Respondent. Relevant here, he filed grievances over the denial of pay for his bereavement leave and the denial of holiday pay for Thanksgiving and the day after Thanksgiving. (GC Exhs. 8, 9.)

On December 9, the parties conducted a meeting regarding Rottinghouse's grievances in Froslear's office. (Tr. 38, 39, 121, 203.) Union steward Barry Perkins appeared with Rottinghouse. (Tr. 39, 122.) Froslear, Luehrmann, and Jeff Merconi, a vice president, appeared for Respondent.[12] (Tr. 39.)

Regarding Rottinghouse's Thanksgiving grievance, Froslear stated that he was not paid because he did not work on Thanksgiving or the day after Thanksgiving. (Tr. 40, 123.) Rottinghouse argued that Respondent's past practice was to pay people who took a personal day before or after a holiday. (Tr. 41.)

At the meeting, Froslear also stated that Rottinghouse's relative was a step-uncle. (Tr. 125.) Rottinghouse argued that the relative was his uncle, not his step-uncle. (Tr. 43.) Rottinghouse was aware of an incident involving another employee who was paid for a bereavement day related to the funeral of his wife's uncle. (Tr. 43–44.) The evidence shows that this employee, John Jeffries, was granted a day of bereavement leave to attend the funeral of an uncle by marriage on September 15. (R. Exh. 1; Tr. 44.) Luehrmann admitted that he had allowed Jeffries' bereavement day.[13] (Tr. 44.)

Following the meeting, Respondent agreed to pay Rottinghouse for his bereavement day. (Tr. 38, 126.) However, Respondent has continued to refuse to pay Rottinghouse for the two-day Thanksgiving holiday. This grievance remained pending at the time of the hearing. (Tr. 27.)

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Credibility of the witnesses is not generally at issue in this case, as there was little variation among their testimony. Where necessary, however, my credibility findings are incorporated into the findings of fact set forth above.

This decision does not require a lengthy credibility determination, as most of the relevant facts are not in dispute. I have found that Froslear made statements expressing frustration or irritation with Rottinghouse's charge filing activity with the Board. I have further found that Respondent's own records demonstrate that other employees were paid for holidays when taking a personal day before or after the holiday, even when the employee called in to use a personal day.

The Board recognizes that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any

[11] Employee Dustin Madden was paid for the New Year's holiday in 2016, even though he called off on the day after the holiday. (Tr. 201.) However, Madden provided a doctor's note for his absence. (R. Exh. 10; Tr. 201.)

[12] There was some confusion over the date of the grievance meeting and the step at which the meeting was held. Luehrmann testified that the meeting at which Froslear made his statement about the NLRB was in January and that it was a second step meeting. (Tr. 208–210.) I do not find the exact date of the meeting or the step of the meeting material, as there is no question that Froslear made a statement expressing annoyance with Rottinghouse's activity with the Board in the presence of Rottinghouse and others.

[13] I do not mention Rottinghouse's testimony that he and Froslear discussed the vagueness of the parties' collective-bargaining agreement because I find it does not bear on the issue of whether Froslear made a statement expressing animosity toward Rottinghouse's activity in filing charges with and assisting the Board.

factual question on which that witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is an agent of a party. *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006). Specifically, the Board will infer that such a witness, if called, "would have testified adversely to the party on that issue." Id.; see also *Flexsteel Industries, Inc.*, 316 NLRB 745, 758 (1995). In particular, the Board will not hesitate to draw an adverse inference from a respondent's failure to present the testimony of a decision maker as to his motive in taking the alleged discriminatory action. *Dorn's Transportation Co., Inc.*, 168 NLRB 457, 460 (1967), enfd. 405 F.2d 706, 713 (2d Cir. 1969); *Vista del Sol Health Services, Inc.*, 363 NLRB No. 135, slip op. at 26 (2016); *The Southern New England Telephone Co.*, 356 NLRB 883, 893–894 (2011); *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999). In this case, Respondent did not call Froslear as a witness even though he was present in the room for the duration of the hearing. Froslear is alleged to have made statements maligning Rottinghouse's Board activity in filing charges with the Board.

B. Respondent Violated the Act by Refusing to Pay the Charging Party for the Thanksgiving Holiday

Section 8(a)(4) of the Act makes it unlawful for an employer to discriminate against an employee because he has filed charges or given testimony under the Act. 29 U.S.C. §158(a)(4). The Board has found that the purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." *Briggs Manufacturing Company*, 75 NLRB 569, 571 (1947). The Board analyzes such allegations under the framework established in *Wright Line*.[14] *Newcor Bay City Division*, 351 NLRB 1034, 1034 fn. 4 (2007). Under this framework, it was the General Counsel's burden to establish discriminatory motivation by proving the existence of protected activity, the Respondent's knowledge of that activity, and the Respondent's animus against that activity. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004), citing *Wright Line*, supra at 1089. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding, Inc.*, 330 NLRB 464, 464 (2000). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Allied Mechanical*, 349 NLRB 1327, 1328 (2007).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

There is no doubt that Rottinghouse engaged in activity assisting the Board in its investigations by filing charges, providing affidavit testimony, and by testifying in Board proceedings. There can also be no doubt that Respondent was aware of this activity, as Luehrmann and Froslear were present at a previous hearing at which Rottinghouse testified. (Jt. Exh. 2.) Respondent's animus toward Rottinghouse's activity is amply demonstrated by Froslear's comments, including, "It's not like you've ever come and talked to us before you filed all these NLRB charges." (Tr. 82, 204.) Furthermore, Froslear's comment that Respondent was altering its break discipline policy in light of NLRB charges, close in time to Rottinghouse's filing of such a charge, provides further evidence of animus toward Rottinghouse and his Board activity.

Froslear was not called as a witness at the hearing, despite being present in the hearing room. (Tr. 14.) The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Therefore, I draw an adverse inference against Respondent by its failure to call Froslear as a witness and find that he made the statements expressing animus toward Rottinghouse's filing of NLRB charges, as testified to by Rottinghouse, Perkins, and Luehrmann.

As the General Counsel has met his initial burden of showing protected activity, employer knowledge of the protected activity, and animus toward the protected activity, the burden now shifts to Respondent to show it would have taken the same action in absence of Rottinghouse's protected conduct.[15] I find that Respondent has not met its burden in this case. Respondent treated Rottinghouse disparately from another employee because the other employee was paid when he called in and took a personal day on the day before Thanksgiving 2016. Specifically, while processing the very same payroll, Respondent made the conscious decision to pay John Jeffries for the Thanksgiving holiday in 2016 at the very same time it decided not to pay Rottinghouse. Jeffries and Rottinghouse took unscheduled days off around the Thanksgiving holiday; one of them was paid and one of them was not. I find this contradiction significant. Therefore, I find that Respondent's stated reason for denying holiday pay to Rottinghouse was pretextual and does not pass muster. Instead, I find that Rottinghouse was denied holiday pay because of Respondent's animus toward his Board activity.

Respondent departed from its practice of paying employees

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[15] I further find that Respondent's denial of holiday pay to Rottinghouse constituted an adverse employment action.

for a holiday when they called in and used a personal day on the day before or after the holiday in denying Rottinghouse his Thanksgiving holiday pay. Given Respondent's disparate treatment of Rottinghouse while allowing holiday pay for other employees in similar circumstances, I conclude that Respondent's denial of holiday pay for Rottinghouse was in retaliation of his activity in filing charges with the Board and violated Section 8(a)(4) of the Act.

C. Respondent's Arguments and Affirmative Defenses

Respondent argues on brief that a "causal nexus" is required between Rottinghouse's protected activity and the adverse employment action. (R. Br. p. 2.) Under extant Board law, no such nexus is required. See *Encino Hospital Medical Center*, 360 NLRB 335, 336 fn. 6 (2014) (no showing of particularized animus towards discriminatee's specific protected activity) and *Mesker Door*, Inc., 357 NLRB 591, 592 fn. 5 (2011) (finding that the judge incorrectly included a "nexus" element as part of the General Counsel's initial burden); *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). Even if a causal nexus were required, I would find that the General Counsel has established one. Allender and Froslear were well aware of Rottinghouse's protected activity with the Board. Froslear commented on this activity twice and Allender was present for at least one of these comments. The evidence establishes that other employees were paid for holidays when they did not work the day before or after a holiday and those employees further did not schedule the days off in advance. Based upon this disparate treatment and Froslear's comments, I would find the General Counsel has established a link between Respondent's animus toward Rottinghouse's protected activity and Respondent's refusal to pay him for the Thanksgiving holiday in 2016. I do emphasize, however, that under current Board law a finding of such a nexus is not required.

I find the case of *Sysco Food Servs. of Cleveland, Inc.*, 347 NLRB 1024 (2006), cited by Respondent in its brief, distinguishable from the instant case. (R. Br. p. 11.) In that case, the Board affirmed the administrative law judge's finding that the General Counsel did not establish animus against an employee's grievance filing activity through two remarks made by a supervisor. 347 NLRB at 1024. The supervisor in that case remarked "[n]ot another one" and "[o]h geez what did I do now" upon receiving grievances from the alleged discriminatee. 347 NLRB at 1035 fn. 26. The judge noted that no further details were provided regarding the timing or context of these remarks and found them to be "shop talk." Id. However, in this case, details were elicited regarding Froslear's comments about Rottinghouse's protected activity. Froslear, a senior management official, made statements expressing irritation with Rottinghouse's protected activity in a large group meeting and at a grievance meeting. He further married the decision of Respondent to more strictly enforce its discipline policy to charge filing activity by an employee. Froslear's later comment directly associated Respondent's decision to more strictly enforce its break policy, specifically as it related to Rottinghouse, to his charge filing activity. I cannot find that these comments are mere shop talk. Instead, I find that Froslear's comments are statements of animus linked to Rottinghouse's Board activity and, as such, violate the Act. These circumstances are factually distinguishable from those in the *Sysco* case cited by Respondent.

I further reject Respondent's argument that Froslear's statements cannot be imputed to those who made the decision to deny Rottinghouse his holiday pay. Section 2(13) of the Act makes it clear that an employer is bound by the acts and statements of its supervisors. *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986). It is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected activities to the decision-maker, unless the employer affirmatively establishes a basis for negating such imputation. *G4S Solutions (USA), Inc.*, 364 NLRB No. 92 slip op. at 4 (2016), citing *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB 1395 (2014). Respondent here has not put forth any evidence that knowledge should not be imputed to its decision-makers. Instead, the evidence establishes that Luehrmann was present not only for the prior Board proceedings in Case 09–CA–158662, but also when Froslear made his comments about Rottinghouse's Board activity. For these reasons, I find that it is proper to impute Respondent's animus toward Rottinghouse's Board activity to those, including Luehrmann, who made the decision to deny his holiday pay.

In its answer to the complaint, Respondent asserted ten affirmative defenses, including failure to state a claim, that the claims in the complaint are time-barred under Section 10(b) of the Act, that the claims in the complaint exceed the scope for the underlying charge, and a failure by the Charging Party to exhaust administrative remedies. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Section 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its affirmative defenses at the hearing, and the affirmative defenses were not raised in Respondent's brief, I will not address them further.

D. Compliance Specification

As indicated above, the General Counsel consolidated the complaint in this case with a compliance specification. The compliance specification alleges the amount of backpay due to the Charging Party for the 2-day Thanksgiving holiday in 2016. As part of my decision herein, I have recommended that Respondent reimburse Charging Party Steven Wayne Rottinghouse, Jr., for the 2 days of work missed and the tax consequences arising therefrom.

Compliance proceedings restore the status quo ante by restoring circumstances that would have existed had there been no unfair labor practices. *Hubert Distributors, Inc.*, 344 NLRB 339, 341 (2005). The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp.*, 329 NLRB 977, 978 (1999). The General Counsel's burden in backpay cases is to show the amount of gross backpay due the discriminatee. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993). Once the General Counsel has intro-

duced the gross backpay due to the discriminatee, the burden shifts to the respondent to establish affirmative defenses that would eliminate or otherwise reduce its backpay liability. *Avery Heights*, 349 NLRB 829, 838 (2007); *Centra, Inc.*, 314 NLRB 814, 815–820 (1994).

In its answer to the complaint, Respondent denied that it owed the Charging Party backpay. However, Respondent further answered that if it were found to owe backpay, it agreed with the General Counsel's calculations in all but one paragraph. However, at the hearing, Respondent stipulated that it agreed with the calculation in this paragraph. (Tr. 216.)

Based upon these admissions and stipulations, I find, as alleged, that the backpay owed Rottinghouse for November 24 and 25, 2016, is properly calculated by multiplying his $21.07 hourly rate by 16 hours. The holiday pay that Rottinghouse would have received but for Respondent's discrimination against him is $337.12. The amount of taxes owed for 2016 are $44.00, as set forth in the compliance specification. The total amount of the lump-sum award that is subject to excess tax liability is $337.12. The adverse tax consequences for which Rottinghouse is entitled to be compensated will be the difference between the 2016 taxes and the taxes calculated for the year in which the payment is eventually made.

Thus, Respondent shall pay to Rottinghouse $337.12 net backpay and expenses, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law, plus the amount of any adverse tax consequences.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(4) and (1) of the Act when it refused to pay Steven Wayne Rottinghouse, Jr., holiday pay for Thanksgiving Day and the day after Thanksgiving 2016.

3. By engaging in the unlawful conduct set forth in paragraph 2, above, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(4) and (1), and Section 2(6) and (7) of the Act.

4. Respondent shall pay to Rottinghouse $337.12 net backpay and expenses, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law, plus the amount of any adverse tax consequences.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily refused to pay employee Steven Wayne Rottinghouse, Jr., for Thanksgiving and the day after Thanksgiving 2016, must make him whole for his lost earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State law. The amounts owed are computed above in this decision and interest and tax liability shall continue to accrue until the date of payment.

In addition, Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file a report allocating backpay with the Regional Director for Region 9. Respondents will be required to allocate backpay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 24, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

Respondent, Airgas USA, LLC, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against any employee for assisting and giving testimony to the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effec-

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, make Steven Wayne Rottinghouse, Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The backpay owed to Rottinghouse is $337.12, plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law.[17]

(b) Within 14 days, remove from its files any reference to the discrimination against Steven Wayne Rottinghouse, Jr., and, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

(c) Within 21 days of the Board's order, file a report allocating backpay to the appropriate calendar years with the Regional Director for Region 9. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(d) Compensate Steven Wayne Rottinghouse, Jr., for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 13, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against you by refusing to pay you holiday pay for assisting or giving testimony to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Steven Wayne Rottinghouse, Jr., whole for his loss of holiday pay resulting from our unlawful discrimination, less tax withholdings required by Federal and State law, plus interest compounded daily.

WE WILL compensate Steven Wayne Rottinghouse, Jr., for the adverse tax consequences, if any, of receiving lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Regional Director allocating backpay to the appropriate calendar years. The Regional Director will then transmit this report to the Social Security Administration at the appropriate time and in the appropriate manner.

WE WILL, within 14 days, remove from our files any reference to the unlawful discrimination against Steven Wayne Rottinghouse, Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discrimination will not be used against him in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

AIRGAS USA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-189551 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[17] As noted above, this lump-sum amount covers backpay, interest, and tax liability through the date of the complaint. Interest and tax liability shall continue to accrue until the actual date of payment.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."